

Issues: Group II Written Notice (failure to follow policy), Group III Written Notice (providing false statements during investigation), Termination and Retaliation (other protected right); Hearing Date: 06/05/12; Decision Issued: 06/07/12; Agency: DCE; AHO: Carl Wilson Schmidt, Esq.; Case No. 9823, 9824, 9825; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9823 / 9824 9825

Hearing Date: June 5, 2012
Decision Issued: June 7, 2012

PROCEDURAL HISTORY

On February 28, 2012, Grievant was issued a Group II Written Notice of disciplinary action for possession of contraband. On February 28, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for giving false statements to security staff during the course of an investigation.

Grievant timely filed grievances to challenge the Agency's disciplinary actions. Grievant also filed a grievance alleging retaliation for reporting workplace harassment. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On May 7, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 5, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?
5. Whether the Agency retaliated against Grievant?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The burden of proof is on the Grievant with respect to her grievance alleging retaliation for workplace harassment. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Correctional Education employed Grievant as an English Instructor II at one of its schools. She began working for the Agency in December 2006 and continued until her removal effective February 28, 2012. The purpose of her position was to, "provide quality educational programs that enable incarcerated youth and adults to become responsible, productive tax-paying members of their communities."¹ Except for the facts giving rise to these disciplinary actions, Grievant's work performance was satisfactory to the Agency. Grievant received an overall rating of "Strong Contributor" on her September 2011 annual performance evaluation.

The School is located inside a Facility operated by the Department of Juvenile Justice. In order to reach her classroom, Grievant had to pass through a security check conducted by officers of the Department of Juvenile Justice. DJJ prohibited individuals entering the Facility to bring contraband with them. Contraband included cigarettes. Grievant knew of the DJJ restriction.

¹ Agency Exhibit 5.

On January 12, 2012, Grievant entered the Facility and passed through the DJJ security checkpoint. She was given a “pat down” consistent with DJJ’s procedures. No cigarettes were found on Grievant.

Grievant arrived at her classroom at approximately 8:45 a.m. Grievant went to the restroom and found two cigarettes. The restroom was accessible to Agency employees and DJJ employees. Within approximately two minutes after finding the cigarettes, Grievant took the cigarettes to the Sergeant and said “Look what I found.” Grievant asked “What should I do with them?” The Sergeant took the cigarettes and asked Grievant to show her where Grievant had discovered the cigarettes.² Near Grievant’s office was a hallway with double doors. When facing the doors, one door would swing open to the left while the other door would swing open to the right. Grievant took the Sergeant to the double doors. She bent down and pointed to the space on the floor between the open double door and the wall. Grievant indicated to the Sergeant that she found the cigarettes at that location. Grievant stated that she was returning from the guidance office and saw the cigarettes on the floor behind the door. Grievant did not appear disoriented or confused to the Sergeant.

The Sergeant asked Grievant to complete an incident report. At 10:57 a.m. on January 12, 2012, Grievant wrote:

At approximately 9 a.m., on the above date. I walked out of [Grievant’s classroom] and upon my return from guidance, saw and picked up two cigarettes from the floor, behind the door by the gym. At this point, I handed them to the [Sergeant].³

The Sergeant filed a report and notified her supervisor. DJJ employees reviewed a video recording for a camera focused on the hallway containing the double doors. Grievant was not observed finding cigarettes behind the double door. Grievant did not work on January 13, 2012 or January 16, 2012. Several days after January 12, 2012, the DJJ Superintendent viewed the Facility’s video recordings of Grievant from the time she entered the Facility until the time she spoke with the Sergeant. The video recordings did not show Grievant picking up two cigarettes behind the double door in the hallway as Grievant claimed. The video showed Grievant arriving at school and entering her classroom. She exited the classroom for a brief second but stood in the doorway and went back to the classroom. Several minutes later, Grievant exited the classroom and walked down the hall to another hall where the restroom was located but where no cameras were located. The video showed Grievant coming down the hallway and then handing something to the Sergeant. They both walked to the door near the classroom and Grievant pointed to the floor behind the door.

² The Sergeant later took the cigarettes to the Shift Commander and completed an incident report.

³ Agency Exhibit 4.

The Superintendent and the Principal met with Grievant regarding the incident. Grievant told the Superintendent and the Principal that she found the cigarettes behind the door next to her classroom. The Superintendent continued to question Grievant and suggested the Grievant may have brought cigarettes into the Facility by mistake. Grievant denied doing so. The Superintendent told Grievant that the video recording did not support her claim that she found the cigarettes behind the double door in the hallway. Grievant then admitted that she found the cigarettes in the restroom and not behind the double door in the hallway. The Superintendent asked where she found the cigarettes and Grievant said behind the toilet. The Superintendent concluded the Grievant had created a false story to lead an investigation of the contraband away from her or from any other Agency employees who often used that restroom.

Because of Grievant's false statement, DJJ security staff devoted approximately 15 hours to investigate Grievant. DJJ chose to ban Grievant from all DJJ facilities. Grievant could no longer perform her duties as a teacher within DJJ facilities.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."⁴ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Group II Written Notice for Possession of Contraband

The Agency contends that Grievant should receive a Group II Written Notice for possession of contraband. On January 12, 2012, Grievant was in possession of two cigarettes before she gave them to the Sergeant. The Agency did not establish that Grievant owned the cigarettes or brought them into the Facility. To the extent Grievant possessed the cigarettes she did so to deliver them to the Sergeant. Possessing contraband for the purpose of delivering it to a member of the DJJ security staff was not contrary to policy. The Agency has not presented sufficient evidence to show the Grievant engaged in behavior giving rise to disciplinary action. The Group II Written Notice must be reversed.

Group III Written Notice for Giving False Statements

"[F]alsification of records" is a Group III offense.⁵ Falsification is not defined by the Standards of Conduct but the Hearing Officer interprets this provision to require

⁴ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁵ See, Attachment A, DHRM Policy 1.60.

proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of “Falsify” found in Blacks Law Dictionary (6th Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer’s interpretation is also consistent with the New Webster’s Dictionary and Thesaurus which defines “falsify” as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

DHRM Policy 1.60 lists numerous examples of offenses. These examples “are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies’ activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.” The Agency contends that making false statements as part of DJJ’s investigation is a Group III offense. This judgment is consistent with DHRM Policy 1.60 which makes falsification of records a Group III offense. Making untruthful statements as part of an agency’s investigation is a Group III offense.

The evidence is sufficient to show that Grievant intended to falsify a document and made untruthful statements to the Sergeant, Principal, and Superintendent as part of an investigation regarding the discovery of contraband at the Facility. Grievant found two cigarettes in the bathroom. Approximately two minutes later, she told the Sergeant that she found the cigarettes behind the door in the hallway. She wrote a statement saying she found the cigarettes behind the door near the gym. Several days later, she told the Superintendent and the Principal that she found the cigarettes behind the door in the hallway. Only after being repeatedly questioned by the Superintendent did Grievant reveal the truth that she had found the cigarettes in the bathroom. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that she did not have sufficient intent to falsify a record or make false statements to the Sergeant, Principal, and Superintendent. Grievant presented evidence of events in her life beginning January 8, 2012 that would cause her to experience a near “nervous breakdown”. She reported to work on January 12, 2012 because of her strong work ethic even though she was not fit to report to work. She presented testimony that her doctor raised the level of her medication too high and that she believed that change affected her mental state. She presented evidence of a

conflict with a close family member that created great stress for her. She presented evidence that she was preoccupied with ensuring that proper medical services were available for a terminally ill friend residing with her. Grievant argued that all of these personal issues made her so disoriented and confused that she incorrectly told the Sergeant that she found the cigarettes behind the double door in the hallway. Grievant argued that she did not have sufficient intent to falsify and did not realize her statements were untrue.

Grievant's argument fails because she continued to insist that she found the cigarettes behind the double doors in the hallway even after several days had passed. Grievant met with the Superintendent and Principal on or after January 17, 2012 and repeated her story that she found the cigarettes behind the door in the hallway.⁶ After the Superintendent told Grievant that the videotape did not support her story, she recanted her original story and then told the Superintendent that she found the cigarettes in the restroom. Grievant admitted during a meeting that she found the cigarettes in the restroom. If she knew during the middle of the meeting with the Superintendent that she found the cigarettes in the restroom, surely she knew that fact at the beginning of her meeting with the Superintendent. When the Superintendent first asked Grievant where she found the cigarettes, Grievant should have told him that she found them in the restroom and that her previous statements to him had been incorrect. Because Grievant initially told the Superintendent that she found the cigarettes behind the double door in the hallway and then shortly thereafter admitted that she found cigarettes in the restroom, the Agency has presented sufficient facts to show the Grievant made false statements to the Superintendent and the Principal. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for giving false statements.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."⁷ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁶ Grievant watched the video on January 18, 2012.

⁷ Va. Code § 2.2-3005.

Grievant argued that the Principal and the Human Resource Director did not wish to take disciplinary action against Grievant but were forced to do so.⁸ It is not unusual for managers within an agency to have different opinions regarding what disciplinary action to take against an employee who has engaged in inappropriate behavior. The matter, as presented to the Hearing Officer, showed that the Agency concluded it was appropriate to take disciplinary action against Grievant by issuing two written notices.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁹ (2) suffered a materially adverse action¹⁰; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.¹¹

Grievant argued that the Agency took disciplinary action against her and concluded to remove her from employment because Grievant complained about workplace harassment she experienced from the Librarian at School. Grievant presented evidence that the Librarian was an abrasive and confrontational coworker and that she repeatedly complained to Agency managers about the Librarian beginning in 2009. Grievant testified that the Agency took little action against the Librarian. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a connection between the protected activity she claims and the materially adverse action taken by the Agency. The evidence showed that the Agency took disciplinary action against Grievant because of her behavior on January 12, 2012. Grievant's assertion that the Agency view the disciplinary action as an

⁸ On February 28, 2012, Grievant met with the Human Resource Director who suggested the possibility of transferring Grievant to another facility. In March 2012, DJJ notified Grievant that she was banned from DJJ facilities.

⁹ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

¹⁰ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

¹¹ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

opportunity to remove her from employment in order to eliminate the conflict between Grievant and the Librarian is speculative. The Agency did not take disciplinary action against Grievant as a pretext for retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice with removal is **upheld**. Grievant's request for relief from retaliation is **denied**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the

EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹²

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.